

CLERK'S OFFICE

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES, PETITIONER,

vs.

STEAMSHIP "EGLANTINE" AND THE UNITED
STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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JUDG & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1942.

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[fol. 4] **IN UNITED STATES DISTRICT COURT EAST-
ERN DISTRICT OF LOUISIANA, NEW ORLEANS
DIVISION, IN ADMIRALTY**

No. —

CLYDE-MALLORY LINES

VS.

STEAMSHIP "EGLANTINE"

LIBEL—Filed June 10, 1937

To the Honorable the Judge of the United States District Court in and for the Eastern District of Louisiana, New Orleans Division, in Admiralty: _____

The libel and complaint of Clyde-Mallory Lines, Owner of the Steamship "BRAZOS", against the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, in a cause of collision, civil and maritime, articulately propounds and alleges, upon information and belief, as follows:

I

That at all times hereinafter mentioned libellant, Clyde-Mallory Lines, was, and now is, a Corporation organized under the laws of the State of Maine, and was, at the time of the collision hereinafter set forth, owner of the Steamship "BRAZOS", which at the time of and until said collision was tight, staunch, strong and in all respects seaworthy.

II

That the Steamship "EGLANTINE" now is, or during the currency of process herein will be, within the jurisdiction of the United States and of this Honorable Court.

[fol. 5]

III

That on December 21, 1932, at the time of the collision hereinafter set forth, the Steamship "EGLANTINE" was owned by the United States of America and was being operated as a merchant vessel of the United States.

IV

That since December 21, 1932, and since the collision hereinafter set forth the Steamship "EGLANTINE" has been sold by the United States of America, and is now owned by Lykes Bros.-Ripley Steamship Co., Inc., a corporation organized under the laws of the State of Louisiana.

V

That in the afternoon of December 21, 1932, the Steamship "BRAZOS" sailed with cargo from Galveston on a voyage to New York by way of Key West and Miami. She was under the command of a competent and experienced master and was manned by competent and experienced officers and crew. The weather was clear, wind light variable, tide ebb. After passing Buoy No. 9, the "BRAZOS" encountered light, patchy fog and slowed down, sounding fog signals as required by law. The master was on the bridge in charge of navigation, the chief officer was also on the bridge, and the third officer was at the wheel. The second officer and two seamen were in the eyes of the ship keeping a careful lookout. The boatswain was standing by the anchor. After passing Buoy No. 3 and while proceeding cautiously, sounding fog signals at short intervals and keeping a sharp lookout, suddenly a steamship, which proved to be the Steamship "EGLANTINE", loomed out of the fog dead ahead lying across the channel. The engines of the "BRAZOS" were immediately put full speed astern, the starboard anchor dropped and the helm put hard aport. The way of the "Brazos" was almost killed, but her stem struck the Steamship "EGLANTINE" on [fol. 6] the port side in the way of No. 2 hold, damaging both vessels. It was ascertained by wireless that the "EGLANTINE" needed no assistance from the "BRAZOS". After an examination showed that the "BRAZOS" was making no water, she proceeded on her voyage. The collision occurred in the channel between 5:30 P. M. and 6 P. M., "BRAZOS" time. No fog signals were heard from the "EGLANTINE" before she came in sight, and the "EGLANTINE" failed to sound any alarm or danger signal.

VI

That on or about December 28, 1932, the libellant herein, as owner of the Steamship "BRAZOS", filed in the United

States District Court for the Southern District of New York, its petition claiming the benefit of the limitation of liability provided in Sections 4282, 4283, 4284, 4285 and 4286, of the Revised Statutes of the United States, and the various statutes supplementary thereto and amendatory thereof, in respect of the aforesaid collision: Thereafter the United States of America appeared in said proceeding, as owner of the Steamship "EGLANTINE", and filed its claim and its answer to the aforesaid petition.

VII

That on or about the 16th. day of February, 1937; said proceeding duly came on for trial and was tried in the United States District Court for the Southern District of New York, and thereafter said Court held and decided that the Steamship "EGLANTINE" and the Steamship "BRAZOS" were both to blame for the aforesaid collision.

VIII

That by reason of the aforesaid collision, Libellant herein sustained damages in the sum of about Forty Thousand Dollars (\$40,000.00). By reason of the aforesaid collision the Steamship "EGLANTINE" sustained damages in the sum of about Twenty Thousand Dollars (\$20,000.00), as nearly as can now be ascertained.

[fol. 7]

IX

That by virtue of its faults contributing to the aforesaid collision, and the aforesaid decision and decree of the United States District Court for the Southern District of New York, the Steamship "EGLANTINE" is liable to the Libellant herein for one-half ($\frac{1}{2}$) the difference between the damages sustained by the Libellants herein by reason of the aforesaid collision and the damages sustained by the Steamship "EGLANTINE" by reason of the aforesaid collision, which sum amounts to about Ten thousand dollars (\$10,000.00), as nearly as can now be ascertained, no part of which has been paid, although payment thereof has been duly demanded.

X

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Libellant prays that process in due form of law according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, and that all persons having or claiming to have any right, title or interest in and to said Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, may be cited to appear and to answer under oath all and singular the matters set forth herein and that this Honorable Court may be pleased to decree payment to Libellant, Clyde-Mallory Lines, the amount of its damages as aforesaid, together with interest and costs, and that the said Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, may be condemned and sold to pay and satisfy the damages and claims aforesaid [fol. 8] with interest and costs, and that Libellant may have such other and further relief as in law and justice it may be entitled to receive:

Burlingham, Vedder, Clark & Hupper; Dengre,
Leovy & Chaffe, Proctors for Libellant.

Duly sworn to by Jas. Hy. Bruns. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER FOR PROCESS—June 10, 1937

Let Admiralty process issue as prayed for.
New Orleans, La., June 10, 1937.

H. J. Carter, Clerk, by H. W. Niehues, Dep. Clerk.

IN UNITED STATES DISTRICT COURT

ADMIRALTY WARRANT AND MARSHAL'S RETURN

The President of the United States of America to the Marshal of the Eastern District of Louisiana or to his lawful Deputy, Greeting:

You Are Hereby Commanded to seize, and into your possession take, the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture now libeled by CLYDE-MALLORY LINES for the cause set forth in the Libel now pending in the District Court of the

United States for the Eastern District of Louisiana (New Orleans Division), that you do cite and admonish the owner, or owners, and all and every other person, or persons, having, or pretending to have, any right, title, or interest in or to the same, to be and appear before a District Court of the United States for the District aforesaid, to be holden at the City of New Orleans, on the 5th day of July, A. D. 1937, to show cause, if any they have or can, why the steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture should not be condemned and sold agreeably to the prayer of Libellant; and how you have executed this warrant that you make return according to law.

Witness, the Honorable Wayne G. Borah, Judge of said Court, at New Orleans, this 10th day of June, 1937, and the [fol. 10] 161st year of the Independence of the United States.

H. J. Carter, Clerk, by H. W. Niehues, Deputy Clerk.

RETURN

No. 289 (Admiralty)

Received this writ at New Orleans, La. on the 10th day of June, 1937, and on the same day, month and year at the hour of 12:30 o'clock p. m., I executed the within admiralty warrant by seizing and taking into my custody the within-named Steamship "Eglantine", her engines, boilers, tackle, apparel, equipment and furniture, as she lay in the Mississippi River at Gretna, La., and served a copy hereof on C. E. Briggs, Chief Mate, on board and in charge of said vessel at the time of seizure.

Hardy C. Richardson, U. S. Marshal, by A. A. Schexnayder, Deputy.

[fol. 11] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION ON BEHALF OF UNITED STATES OF AMERICA—
Filed June 10, 1937

To the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana:

Come Now, Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and Lucian Y. Ray,

Special Attorney in Admiralty, representing in this behalf the interest of the United States of America, and suggest to the Court:

I

That this is an action in rem against the Steamship EGLANTINE, her engines, boilers, tackle, apparel, etc., which vessel at the time of the alleged damage, to-wit, December 21st, 1932, was owned and operated by or for the United States.

II

That on June 10th, 1937, the said Steamship EGLANTINE was seized under a warrant of seizure issued out of this Honorable Court and is now being held under such warrant.

[fol. 12]

III

That Libellant claims its cause of action arose against the Steamship EGLANTINE while that vessel was owned and operated by or for the United States of America, and that on December 21st, 1932, the said Steamship EGLANTINE was improperly at anchor in the approach to Galveston Harbor, and came into collision with the Steamship BRAZOS, owned by Libellant, causing damage to the latter vessel.

Now, Therefore, in view of the premises, the United States Attorney for the Eastern District of Louisiana, states to the Court:

That the United States of America is a party at interest in said action; that said action is a claim against the United States of America; that the United States desires the release of the Steamship EGLANTINE and assumes the liability for the satisfaction of any decree which may be obtained in said cause, generally reserving to itself the benefit of all exemptions and defenses, and of all limitations of liability accorded by law to the owner of such vessel, including the benefit of limitation as set forth in Section 5 of the Act Approved March 9th, 1920 (41 Stat. 526, c. 95, sec. 5; 46 U. S. Code Sec. 745), as amended June 30th, 1932; and specially reserving the right to object to this Honorable Court entertaining jurisdiction of the subject-matter, viz:

the assertion of alleged lien liability against the Steamship EGLANTINE for cause stated in said libel.

Wherefore, the said Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, prays that the said Steamship EGLANTINE be discharged and released in accordance with Section 4 of the Act of Congress approved March 4th, 1900.

(Sgd.) Rene A. Viosca, United States Attorney.

(Sgd.) Lucian Y. Ray, Special Attorney in Admiralty. (Sgd.) William I. Connelly, Admiralty Attorney, U. S. Maritime Commission, of Counsel.

New Orleans, Louisiana, June 10th, 1937.

IN UNITED STATES DISTRICT COURT

ORDER OF RELEASE—June 10, 1937

It appearing to the Court upon the suggestion of Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, who appears herein for the United States of America, that the said United States is a party at interest in the above numbered and entitled cause, and that a libel has been filed against the Steamship EGLANTINE by reason of a claim arising against said vessel at a time when it was owned and operated by or for the United States of America;

And it further appearing that the United States has set up its interest and asked that the Steamship EGLANTINE be released from the warrant of seizure under which it is now held; and that the United States has assumed all liability for the satisfaction of any decree which may be obtained in said cause, subject to all general and special defenses provided by law:

Now, Therefore, it is Ordered that the Steamship EGLANTINE be discharged and released from the warrant of seizure which it is now held in this cause, and that no bond be required.

It is further Ordered that the United States Marshal be furnished with a copy of this order.

(S.) Rufus E. Foster, United States Circuit Judge.

New Orleans, Louisiana. June 10th, 1937.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTION ON BEHALF OF UNITED STATES—Filed June 14,
1937

To the Honorable Wayne G. Borah, Judge of the United
States District Court for the Eastern District of Louisi-
ana:

Comes now the United States of America, Respondent
herein, and excepts to the libel filed herein, for that, to-
wit:

The libel, on its face, indicates that it was not filed in
compliance with the provisions of Section 5 of the Suits
in Admiralty Act (March 9th, 1920, c. 95, Sec. 5, 41 Stat.
526; 46 U. S. Code, Sec. 745, as amended).

Wherefore, Respondent prays that the libel herein may
be dismissed at Libellant's cost.

Lucian Y. Ray, Special Assistant in Admiralty to
the United States Attorney, William J. Connelly,
Attorney, U. S. Maritime Commission, Proctors for
Respondent.

New Orleans, Louisiana. June 14th, 1937.

[fol. 15] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF ARGUMENT ON EXCEPTION—January 19,
1938

New Orleans, Wednesday, January 19th, 1938.

Court met pursuant to adjournment;
Present: Hon. Wayne G. Borah, Judge.

Hearing on Exceptions

[Number and title omitted]

The exceptions filed on behalf of the respondent herein,
came on this day to be heard:

Present: William I. Connelly, Esq., Proctor for the Respondent, exceptor:

James H. Bruns, Esq., Proctor for the Libellant; and was argued by proctors for the respective parties and submitted, when the Court took time to consider.

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING EXCEPTION—May 16, 1938

The exception of the respondent herein, having come on at a former day to be heard, and after argument of proctors for the respective parties, was submitted and the Court took time to consider,

Whereupon, and on due consideration thereof, It is Ordered that the exception herein be and the same is hereby overruled.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed June 15, 1938

[fol. 17] Now comes the United States of America, Intervening Claimant herein, specially and specifically reserving all rights which appear in its Petition of Intervention, filed herein June 10th, 1937, together with reservation of its rights as asserted by the Exception to the Libel, filed herein June 14th, 1937, and with such express reservations, now for Answer to the Libel respectfully shows:

I

Intervening Claimant has no knowledge or information sufficient to form a belief as to the allegations of Article I. of the Libel, and, therefore, denies same. Intervening Claimant especially denies that the Steamship BRAZOS was at the times mentioned in the Libel in all respects seaworthy.

II

The allegations of Article II of the Libel are admitted.

III

The allegations of Article III of the Libel are admitted.

IV

The allegations of Article IV of the Libel are admitted.

V

For answer to Article V of the Libel, Intervening Claimant admits that in the afternoon of December 21st, 1932, the Steamship BRAZOS sailed with cargo from Galveston on a voyage to New York by way of Key West and Miami; [fol. 18] there was a light variable wind and an ebb tide, at sometime after departure from the dock at Galveston, the BRAZOS encountered fog and sounded fog signals are required by law; the Master, Chief Officer and Third Officer were on the bridge, and the Second Officer and other seamen were forward to act as lookout. The boatswain was standing by the anchor. After passing Buoy No. 3, sounding fog signals at short intervals, a steamship which proved to be the EGLANTINE, loomed out of the fog dead ahead; the engines of the BRAZOS were immediately put full speed astern, the starboard anchor was dropped and the helm put hard aport, but the stem of the BRAZOS struck the Steamship EGLANTINE on the port side in the way of No. 2 Hold, damaging both vessels. It was ascertained by wireless that the EGLANTINE needed no assistance from the BRAZOS and after examination showed that the BRAZOS was making no way, she proceeded on her voyage. The collision occurred between 5:30 p. m. and 6:00 P. M., BRAZOS time. All remaining allegations contained in Article V of the Libel are denied.

Further answering, Intervening Claimant shows that in the afternoon of December 21st, 1932, the Steamship EGLANTINE, inbound with cargo, was lying at anchor off the entrance to Galveston Harbor awaiting a pilot. In that place and position, there remained and was adequate sea-room and water for other vessels to safely pass outward to sea by the observation of routine regulations and proper, safe, precautionary measures. The weather was foggy, light, easterly wind, tide ebb, sea smooth. The EGLAN-

TINE was fully manned, equipped and supplied and in all respects seaworthy. A proper and competent watch was maintained and, prior to the collision hereinafter described, she was displaying regulation anchor lights which were burning brightly. Fog signals prescribed by law for a vessel at anchor were being sounded. While the EGLANTINE was lying so moored, fog signals from a vessel under way, which later proved to be the BRAZOS, were heard approaching [fol. 19] ing from the direction of Galveston, on the port side. Shortly thereafter the BRAZOS came out of the fog at a high and dangerous rate of speed and although there was adequate sea-room and maneuvering area in the vicinity, which could and should have been utilized by the BRAZOS, the navigators of the BRAZOS failed to sufficiently change her course and she collided with the port side of the EGLANTINE, tearing a hole in the EGLANTINE'S port side abreast of #2 Hatch and causing serious damage to her hull and the cargo laden on board.

VI

The allegations of Article VI of the Libel are admitted.

VII

The allegations of Article VII of the Libel are admitted.

VIII

Answering Article VIII of the Libel, Intervening Claimant admits the S. S. EGLANTINE sustained damages as a result of said collision, but for want of sufficient knowledge or information sufficient to form a belief, the remaining allegations of Article VIII of the Libel are denied.

IX

For answer to Article IX of the Libel, Intervening Claimant admits that under an interlocutory decree of the United States District Court for the Southern District of New York, the Steamship EGLANTINE has been held equally to blame with the S. S. BRAZOS, owned by Libellant, for said collision; the remaining allegations of Article IX are denied, and Libellant is put to strict proof thereof.

[fol. 20]

X.

The allegations of Article X of the Libel are denied; Intervening Claimant shows the full truth is to be found herein.

XI

For further answer and as a separate and special defense, Intervening Claimant shows that at the time the cause of action stated in the Libel accrued, the Steamship EGLANTINE was owned by the United States of America and was operated as a merchant vessel of the United States; that the present Libel is essentially a claim against the United States of America for a cause of action arising out of the operation of its merchant marine, and any liability for the satisfaction of a decree which may be obtained in this cause has been assumed by the United States of America, with a general reservation of the benefit of all exemptions and defenses of all limitations of liability accorded by law, including the benefit of limitations as specifically set forth in Section 5 of the Act approved March 9th, 1920, (41 Stat. 526, c. 95, section 5; 46 United States Code, Section 745); as amended June 30th, 1932. Intervening Claimant shows that the cause of action stated in the Libel arose more than two years before commencement of this proceeding and is, therefore, barred.

XII

For further answer, and as a separate and special defense, Intervening Claimant avers that Libellant may not attempt to impose lien liability upon the S. S. EGLANTINE while now owned by Lykes Bros.-Ripley Steamship Company for any incident which occurred while said vessel was owned and operated for and by the United States.

[fol. 21]

XIII

For further answer, and as a separate and special defense, Intervening Claimant avers that Libellant may not attempt to impose lien liability upon the S. S. EGLANTINE while now owned by Lykes Bros.-Ripley Steamship Company because of any event which occurred during the period of ownership by the United States, and more than two years prior to the institution of legal proceedings.

XIV

For further answer, and as a separate and special defense, Intervening Claimant shows that if there had, at any time, been any claim or demand against the S. S. EGLANTINE or against its owner by reason of the incidents alleged the Libel, which Intervening Claimant denies, then said claim is barred by the lapse of time and the negligence of the Libellant to have a settlement of the same; and Intervening Claimant, therefore, pleads that any such claim, if any there be, or was, is barred and cannot now be collected because such Libellant has allowed this claim to sleep until after ownership of the property was transferred from the United States of America into the innocent hands of Lykes Bros.-Ripley Steamship Co., Inc.

IV

For further answer, and as a separate and special defense, Intervening Claimant shows that Libellant, with full knowledge of all the facts, did not commence any proceeding to recover from the S. S. EGLANTINE or the owner at the time said cause of action accrued, the United States of America, until the institution of these proceedings and Intervening Claimant, therefore, alleges that Libellant has been guilty of laches and that its failure to prosecute an action prior to June 10th, 1937, has been such laches as should and does bar this action in a court of admiralty.

[fol. 22]. Wherefore, Intervening Claimant prays that the Libel herein may be dismissed with costs against Libellant, and for such other and further relief to which in law Intervening Claimant may be entitled and this Court competent to grant.

Rene A. Viosca, United States Attorney; L. V. Cooley, Jr., Assistant United States Attorney; W. J. Connelly, Attorney, U. S. Maritime Commission, Proctors for Intervening Claimant.

New Orleans, Louisiana, July 13, 1938.

Duly sworn to by W. J. Connelly. Jurat omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER RE ANSWER AND INTERROGATORIES—July 15, 1938

Let the above and foregoing Answer be filed, and Libellant file its answers to the Interrogatories which have been propounded by Respondent, under oath, within thirty (30) days from date of service hereof.

Wayne G. Borah, United States District Judge.

New Orleans, Louisiana, July 15th, 1938.

IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOSED BY RESPONDENT TO BE ANSWERED,
UNDER OATH, BY LIBELLANT

1. Submit a detailed, itemized statement of the damages as claimed in the Libel, and Show the exact method used in arriving at the total amount claimed.

2. Is it not a fact that the Libel herein undertake to impose lien liability upon the S. S. EGLANTINE for the collision which occurred December 31st, 1932, off Galveston, Texas, while the S. S. EGLANTINE was owned and operated by and for the United States of America through the United States Shipping Board Merchant Fleet Corporation and Lykes Bros. Ripley Steamship Co., Inc.?

3. Is it not a fact that the Libel herein is the first pleading of any kind ever filed in a proceeding in any court of the United States by Clyde-Mallory Lines, or the S. S. BRAZOS, seeking to recover from the United States or the S. S. EGLANTINE, damages alleged to have been sustained by the S. S. BRAZOS as a result of collision with the S. S. EGLANTINE at the time and place stated in this Libel?

[fol. 24] 4. Is it not a fact that the Libel herein represents the first attempt on behalf of the S. S. BRAZOS and/or its interests, to affirmatively recover from the United States of America and/or the S. S. EGLANTINE for damages alleged to have been sustained by the S. S. BRAZOS as a result of collision with the S. S. EGLANTINE at the time and place stated in this Libel?

5. Explain any answer you may make to Interrogatories 3 and 4 if you deny the facts therein stated to be true, and

(a) Annex an exemplified copy of the initial pleadings filed;

(b) Describe the progress of the case, stating the substance of all pleadings filed;

(c) State what disposition was made of the case.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTION AND ANSWER OF CLYDE-MALLORY LINES TO INTERROGATORIES—Filed August 12, 1938

Now into Court comes Clyde-Mallory Lines, Owner of the Steamship "BRAZOS" Libellant herein, and for exception and answer to the Interrogatories propounded herein by the United States of America, Claimant herein, with its Answer, alleges and denies under oath as follows:

1. Libellant, through its Proctors in New York, who represent Libellant in the litigation at New York, referred [fol. 25] to in Articles VI and VII of the Libel, (all of the allegations of which Articles are admitted in the Answer herein of Claimant, United States of America) has submitted to the United States Attorney in New York, who represents Claimant in the said litigation in New York, a detailed itemized statement of the damages alleged to have been sustained by the Libellant as a result of the collision set forth in the Libel and Libellant, through its said Proctors in New York has received from said United States Attorney in New York a detailed itemized statement of the damages claimed to have been sustained by Claimant herein, United States of America, by reason of the collision set forth in the libel. Extensive negotiations looking toward an agreement on the damages have been had between the said parties and there are only a few things items which have not been agreed to. For this reason, and because this Interrogatory seeks to elicit facts concerning the amount of damages rather than facts con-

needed with the liability for the said collision, Libellant excepts to this said Interrogatory No. 1.

2. It is a fact that the Libel herein undertakes to impose lien liability upon the Steamship "EGLANTINE" for the collision which occurred December 21st, 1932, off Galveston, Texas, while the Steamship "EGLANTINE" was owned by the United States of America, and was being operated as a merchant vessel of the United States. Libellant does not know whether such operation was through the United States Shipping Board Merchant Fleet Corporation and Lykes Bros.-Ripley Steamship Co., Inc.

3. Yes.

4. Yes.

5. See answers to Interrogatories Nos. 3 and 4.

(Sgd.) Burlingham, Veeder, Clark & Hupper, (Sgd.)
Denegre, Leovy & Chaffe, Proctors for Libellant.

[fol. 26] *Duly sworn to by John E. Craig. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

: [Title omitted]

EXCEPTION OF CLYDE-MALLORY LINES TO ANSWER—Filed
August 12, 1938

Now into Court comes Clyde-Mallory Lines, Owner of [fol. 27] the Steamship "BRAZOS"; Libellant herein, through its undersigned Proctors, and excepts to the Answer filed herein by the United States of America, Claimant herein, and moves to strike out of said Answer Articles XI, XII, XIII, XIV and XV, and for leave to enter an Interlocutory Decree herein, for the following causes and reason, among others, to wit:

Articles XI, XII and XIII of said Answer attempt to raise an issue as to the application of this suit of the limitation on the beginning of suits prescribed in Section 5 of the Act of Congress approved March 9th, 1920, as amended,

U. S. Code Annotated, Title 46, Sec. 745, as amended, which issue has already been determined by this Court in this case by order dated May 16th, 1938, overruling Claimant's exceptions to the Libel dated June 14th, 1937;

Articles XIV and XV of said Answer attempt to raise the issue of laches, whereas it is plain upon the face of the Libel and the Answer herein that Libellant has not been guilty of laches in seeking a determination of liability for the collision in suit, and that such a determination has already been had by the Libellant and Claimant herein in a proceeding for limitation of liability instituted by Libellant in the United States District Court for the Southern District of New York, wherein it has been finally determined between the parties hereto that Libellant's vessel Steamship "BRAZOS", and Claimant's vessel, Steamship "EG-LANTINE" were both to blame for the collision in suit.

Wherefore Libellant prays that Articles XI, XII, XIII, XIV and XV may be stricken out of the Answer filed herein by the United States of America, Claimant herein, and that Libellant may have leave to enter against said Claimant herein an Interlocutory Decree for the recovery of one-half the difference between the amount of its damages resulting from the collision in suit and Claimant's damages resulting from the collision in suit, together with interest [fol. 28] and costs, and that Claimant, the United States of America, through its Proctors of Record, may be ordered to show cause, if any it has or can, on a day to be fixed by the Court, why the relief herein prayed for by Libellant should not be granted, and Libellant further prays for all other and further relief and orders in the premises as the justice of the cause may require.

(Sgd.) Burlington, Veeder, Clark & Hupper, Denegre,
Leovy & Chaffe, Proctors for Libellant, Exceptor
and Mover.

Duly sworn to by Jas. Hy. Bruns. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed January 8, 1941

Without prejudice to the Exceptions to the libel filed by the United States and without prejudice to the Exceptions and the Motion to Strike filed by the Clyde-Mallory Lines in connection with the Answer of the United States of America, it is hereby stipulated by and between the parties hereto that:

1. Libellant herein Clyde-Mallory Lines, is, and at all pertinent times was, a corporation duly organized under the laws of the State of Maine, and owner of Steamship BRAZOS, her engines, etc.;

2. Steamship EGLANTINE was at the time of the service of process in this suit within the jurisdiction of the United States and of this Honorable Court;

3. On December 21, 1932, the BRAZOS and the EGLANTINE were in collision, at which time the EGLANTINE was owned by the United States of America and was being operated as a merchant vessel of the United States;

4. Subsequent to the aforesaid collision of December 21, 1932, but prior to the beginning of this suit, the EGLANTINE was sold by the United States of America [fol. 30] and at the time of the beginning of this suit the EGLANTINE was owned by Lykes Bros. Ripley Steamship Co., Inc. a Louisiana corporation;

5. On or about December 23, 1932, Clyde-Mallory Lines, the same corporation as the libellant herein, filed in the United States District Court for the Southern District of New York its petition claiming the benefit of the limitation of liability provided in Sections 4282-4286 of the Revised Statutes of the United States as amended, in respect of the aforesaid collision. A copy of said petition is attached hereto, marked Exhibit A. Thereafter, the United States of America duly appeared in said proceeding as owner of the EGLANTINE and filed its claim and its answer to the petition. True copies of the claim and answer are attached hereto, marked respectively Exhibit B and Exhibit C;

6. On or about February 16, 1937 said proceeding duly came on for trial and was tried in the United States District

Court for the Southern District of New York and thereafter said Court held and decided that the EGLANTINE and the BRAZOS were mutually at fault for the aforesaid collision. An interlocutory decree was thereafter duly entered, a true copy of which is attached hereto, marked Exhibit D;

7. Thereafter the United States of America duly appealed to the Circuit Court of Appeals for the Second Circuit from the aforesaid interlocutory decree; said appeal duly came on for argument and was argued, and, after consideration, the Circuit Court of Appeals for the Second Circuit affirmed the aforesaid interlocutory decree, holding that the aforesaid collision resulted from the mutual fault of the BRAZOS and the EGLANTINE. Subsequently a final decree was entered in the United States District Court for the Southern District of New York upon the mandate of the Circuit Court of Appeals for the Second Circuit affirming the [fol. 31] aforesaid interlocutory decree. A true copy of the aforesaid final decree on mandate is attached hereto and marked Exhibit E;

8. As appears from a stipulation of the parties attached to the aforesaid final decree on mandate the damage sustained by Clyde-Mallory Lines, petitioner in that proceeding and libellant in this suit, by reason of the aforesaid collision, amount to the sum of \$34,280.93 and the damages sustained by the United States of America by reason of the aforesaid collision, amounted to the sum of \$26,621.70, both of these sums being exclusive of interest;

9. The dates upon which the several items of damage sustained by Clyde-Mallory Lines and the United States of America were offered and paid are set forth in a statement attached hereto, marked Exhibit F;

10. The libel filed herein is the first pleading of any kind and the first attempt by Clyde-Mallory Lines, or on behalf of the BRAZOS, seeking to recover affirmatively from the EGLANTINE or the United States of America the damages sustained by Clyde-Mallory Lines or the BRAZOS by reason of the aforesaid collision;

Dated: New Orleans, Louisiana, January 8th, 1941.

Burlingham, Veeder, Clark, & Hupper, Denegre,
Leovy & Chaffe, Proctors for Libellant. L. V.
Cooley, Jr., Asst. United States Attorney.

[fol. 32] EXHIBIT "A" TO STIPULATION OF FACTS

THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

The Petition of CLYDE-MALLORY LINES, Owner of Steamship
BRAZOS, in a Cause of Limitation of Liability, Civil and
Maritime, Alleges

PETITION

To the Honorable the Judges of the United States District
Court for the Southern District of New York:

The petition of Clyde-Mallory Lines, owner of steamship
BRAZOS, in a cause of limitation of liability, civil and
maritime, alleges:

First. At all the times hereinafter mentioned petitioner,
Clyde-Mallory Lines, was and now is a Maine corporation,
with an office and principal place of business at Pier 36,
North River, New York City, within this District, and it
was at the time of the collision hereinafter set forth owner
of the steamship BRAZOS. At all of said times petitioner
manned, victualed and navigated said vessel within the
meaning of Section 4286 of the Revised Statutes of the
United States.

Second. The BRAZOS is a steel screw vessel, 4497 tons
gross and 2793 tons net register, 391.9 feet long, 48.3 feet
beam and 26 feet depth, built in Newport News, Virginia,
in 1899. The petitioner used due diligence to make said
vessel seaworthy, and until the accident hereinafter men-
tioned she was tight, staunch, strong, fully manned,
[fol. 33] equipped and supplied and in all respects sea-
worthy and fit for the service in which she was engaged.

Third. In the afternoon of December 21, 1932, the
BRAZOS sailed from Galveston on a voyage to New York
by way of Key West and Miami with cargo. She was under
the command of a competent and experienced Master and
was manned by competent and experienced officers and
crew. The weather was clear, wind light variable, tide ebb.
After passing Bouy No. 9, the BRAZOS encountered light,
patchy fog and slowed down sounding fog signals as re-
quired by law. The master was on the bridge in charge of
navigation; the chief officer was also on the bridge, and

the third officer was at the wheel. The second officer and two seamen were in the eyes of the ship, keeping a careful lookout. The boatswain was standing by the anchor. After passing *Bouy No. 3*, while proceeding cautiously, sounding fog signals at short intervals and keeping a sharp lookout, suddenly a steamship, which proved to be the *EGLANTINE*, loomed out of the fog dead ahead lying across the channel. The *BRAZOS*' engines were immediately put full speed astern, the starboard anchor dropped and the helm put hard aport. The *BRAZOS*' way was almost killed, but her stem struck the *EGLANTINE* on the port side in the way of No. 2 hold, damaging both vessels. It was ascertained by wireless that the *EGLANTINE* needed no assistance from the *BRAZOS*. After examination showed the *BRAZOS* was making no water, she proceeded on her voyage. The collision occurred in the channel between 5:30 and 6 p. m., *BRAZOS* time. No fog signals were heard from the *EGLANTINE* before she came in sight.

Fourth. Those in charge of the *BRAZOS* were careful at all times in the performance of their duties and navigated the *BRAZOS* prudently and skillfully. The aforesaid collision and the loss, damage and destruction resulting therefrom were not caused or contributed to by any fault, neglect or want of care on the part of the *BRAZOS* or [fol. 34] those in charge of her, the petitioner herein or anyone for whom petitioner may be responsible, but were caused solely by the negligence of the steamship *EGLANTINE* and those in charge of her in the following respects, among others:

1. She was not in charge of a competent person.
2. She failed to keep a good anchor watch.
3. She failed to sound proper signals in fog.
4. She failed to give proper and timely notice of her position under the circumstances of the wind and weather prevailing.
5. She was lying athwart the channel in a position rendering navigation in the vicinity dangerous.
6. She was anchored in an improper place.
7. She negligently and unlawfully anchored in the channel in such a manner as to prevent and obstruct the passage of vessels bound out of Galveston.

8. She negligently failed to take bearings to ascertain her anchored position.

9. She failed to shift her anchorage after it was known or should have been known that she was anchored in the channel or fairway.

10. She failed to hear or heed the BRAZOS' fog signals.

11. She failed to take any or proper precautions to avoid collision when danger of collision was or should have been apparent.

[Vol. 35] Fifth. Said collision and the loss, damage and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of petitioner.

Sixth. Petitioner is informed that as a result of the collision the EGLANTINE sustained serious damage to her hull and cargo. At the present time petitioner does not know whether there has been any further damage or the amount of claims for injuries, losses and damages arising out of the collision.

Petitioner has been informed and believes that a suit or suits may be begun in the United States District Court for the Southern District of Texas by United States of America, owner of the EGLANTINE and as bailee of her cargo, against the BRAZOS and/or petitioner to recover for damages sustained as a result of the collision in the sum of \$80,000.

Messrs. Bigham, Englar, Jones & Houston, proctors for certain cargo on the EGLANTINE have informed petitioner that they expect to begin a suit in the United States District Court for the Southern District of New York against the BRAZOS to recover for damage sustained by certain cargo as a result of the collision. The amount of the damages is not yet known.

In addition to the foregoing suit or suits, other claims may be made against the BRAZOS and petitioner and further actions or suits instituted against the petitioner and/or the BRAZOS to recover for loss, damage and destruction resulting from said collision.

Seventh. There are no demands, unsatisfied liens or claims of liens against said steamship BRAZOS, her engines, boilers, etc., or any suits pending thereon, so far as is known to your petitioner, except as above set forth.

[fol. 36] Eighth. The value of the steamship BRAZOS upon her arrival in New York following the collision above referred to and at the end of the voyage upon which the collision occurred did not exceed the sum of \$23,500. The freight for the transportation of cargo on board the BRAZOS when the collision occurred amount- to \$7,988. There was no passage money. Petitioner is advised that the entire aggregate value of the interest of petitioner in said st-amship BRAZOS and her pending freight at the end of the voyage on which the collision occurred does not exceed the sum of \$31,500, the value of the BRAZOS in damaged condition at the end of the voyage upon which the collision occurred and her pending freight.

Subject to an appraisal of petitioner's interest on a reference, petitioner offers an ad interim stipulation for value in the sum of \$31,500, said sum being in excess of the aggregate value of petitioner's interest in said vessel and her pending freight and passage moneys, if any.

Ninth. The petitioner claims exemption from liability for the losses, damages, injuries and destruction occasioned, incurred or resulting from said collision as aforesaid and/or subsequent damages resulting herefrom and for the claims for damages that have been made or thereafter may be made, and petitioner alleges that it had valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of cargo, the terms of which contracts will more fully appear upon the trial of this proceeding.

Petitioner further claims the benefit of the limitation of liability provided in Sections 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, and the various statutes supplementary thereto and amendatory thereof, and to that end petitioner is ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of the petitioner's interest in the steamship BRAZOS and her pending freight, whenever [fol. 37] the same shall be ordered by this Court, as provided for by the aforesaid statutes, by General Rules 51 and 54 in Admiralty, and by the rules and practice of this Honorable Court.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays:

1. That this Court cause due appraisement to be made of the amount or value of petitioner's interest in the steamship BRAZOS at the end of the voyage upon which the aforesaid collision occurred, and her pending freight for the aforesaid voyage.

2. That the Court make an order directing the petitioner to file a stipulation, with surety to be approved by the Court, for the payment into Court of the amount of petitioner's said interest whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all loss, damage, injury or destruction sustained, occasioned or incurred by or resulting from said collision between the steamship BRAZOS and the steamship EGLANTINE as above set forth, citing them to appear before a commissioner to be named by the Court in said order, and make due proof of their respective claims, and also to appear and answer the allegations of this petition according to the law and the practice of this Court at or before a certain time to be fixed by the monition.

4. That the Court make an order directing that on the giving of such stipulation as may be determined to be proper, or of an ad interim stipulation, an injunction shall issue, restraining the prosecution of any and all actions, [fol. 38] suits and proceedings already begun to recover for damages arising out of, occasioned by or consequent upon, the aforesaid collision between the steamships BRAZOS and EGLANTINE, as stated in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding, against the petitioner or its agents or representatives, or against the steamship BRAZOS, her engines, etc., or pending freight and passage moneys, if any, in respect to any claim or claims arising out of the aforesaid voyage and collision.

5. That the Court in this proceeding will adjudge that the petitioner is not liable to any extent for any loss, damage or injury or for any claim whatsoever in any way arising out of or in consequence of the aforesaid voyage and collision, or if petitioner shall be adjudged liable, then

that such liability be limited to the amount or value of petitioner's interest in the steamship BRAZOS and her pending freight at the end of the voyage on which she was engaged at the time of said collision, and that petitioner be discharged therefrom upon the surrender of its interest in said steamship BRAZOS and her pending freight, as aforesaid, and that the moneys surrendered, paid or secured to be paid, as aforesaid, be divided pro rata among such claimants as may duly prove their claims before the commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled, and that a decree may be entered, discharging petitioner from all further liability.

6. That petitioner may have such other and further relief as the justice of the cause may require.

Burlingham, Veeder, Fearey, Clark & Hupper,
Proctors for Petitioner.

(Duly Verified)

○ [fol. 39] EXHIBIT "B" TO STIPULATION OF FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

A-110-104

In the Matter of the Petition of CLYDE-MALLORY LINES, for
Limitation of Liability

And Now Comes the United States of America in the above entitled proceeding and makes claim against the Clyde-Mallory Lines, petitioner herein, and the Steamship BRAZOS as follows:

The United States of America is a corporation sovereign and at the times hereinafter mentioned is the owner of the Steamship EGLANTINE, her engines, boilers, etc., and bailee of the cargo laden in and aboard said steamship.

On December 21, 1932, said Steamship BRAZOS, while proceeding through Galveston Harbor bound to sea, came into collision with, the said Steamship EGLANTINE which was fog bound and lying at anchor, as a result of which, said Steamship EGLANTINE and her cargo sustained serious damage.

Said collision was caused by and contributed to by the fault and negligence of the persons in charge of the said Steamship BRAZOS.

By reason of said collision the United States of America, as owner of Steamship EGLANTINE and bailee of her cargo, has sustained damages in the sum of about \$75,000.00, so near as the sum can at the present time be ascertained.

[fol. 40] Numerous claims have been made against the United States of America, as owner of Steamship EGLANTINE, for losses and damages sustained to cargo by reason of said collision and for salvage services rendered to said vessel after the collision aforesaid. It is not now possible and will not be possible before the legal adjudication thereof to state the amount of such claims allowed or proved against the United States of America, but said United States of America makes further claim in addition to its damages as aforesaid and makes such claim against the Clyde-Mallory Lines and said Steamship BRAZOS for all such sums as may be allowed or adjudged against it and hereby gives notice of its intent to hold the Steamship BRAZOS and the Clyde-Mallory Lines responsible for all damages which it may sustain by reason of such allowance and adjudication of claims against it and for all monies which it may be called upon to pay to other persons or corporations for loss, injury or damages arising from said collision.

Dated, New York, N. Y. February 14, 1933.

United States of America, (S.) by George Z. Med-
alie, United States Attorney. C. E. W.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT
OF NEW YORK

STATE OF NEW YORK,

County of New York, ss:

Charles E. Wythe, being duly sworn, deposes and says:

[fol. 41] That he is a Special Assistant to the United States Attorney for the Southern District of New York and is in charge of this litigation; that he has read the foregoing Claim and knows the contents thereof, and that the

same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true;

That the sources of deponent's information and the grounds of his belief are documents and reports in his possession;

That the reason this verification is made by deponent and not by Claimant is that Claimant is a corporation sovereign.

C. E. Wythe.

Sworn to before me this 14th day of February, 1933.
Albert L. Fager, Notary Public, New York County
No. 2. New York Co. Register's No. 4-F-301. My
Commission expires March 30, 1934. (Seal.)

EXHIBIT "C" TO STIPULATION OF FACTS

ANSWER OF UNITED STATES

To the Honorable the Judges of the United States District Court Southern District of New York:

The Answer of the United States of America, as owner of Steamship EGLANTINE, claimant, to the petition of Clyde-Mallory Lines, owner of Steamship BRAZOS, in a [fol. 42] cause of limitation of liability, civil and maritime, alleges upon information and belief and respectfully shows as follows:

First: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article First of the petition.

Second: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Second of the petition.

Third: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Third of the petition, except as hereafter specifically admitted or alleged in Article Eleventh of this Answer.

Fourth: Claimant denies the allegations of Article Fourth of the petition.

Fifth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Fifth of the petition.

Sixth: Claimant admits that as a result of the collision the EGLANTINE sustained serious damage to her hull and cargo. Further answering, claimant denies any knowledge or information sufficient to form a belief as to the other allegations of Article Sixth of the petition.

Seventh: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Seventh of the petition.

Eighth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Eighth of the petition.

[fol. 43] Ninth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations contained in Article Ninth of the petition.

Tenth: Claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court and denies the other allegation of Article Tenth of the petition.

Eleventh: Further answering, claimant alleges that in the afternoon of December 21, 1932, the steamship EGLANTINE, inbound with cargo, was lying at anchor off the entrance to Galveston Harbor awaiting a pilot. The weather was foggy, light easterly wind, tide ebb, sea smooth. The EGLANTINE was fully manned, equipped and supplied and in full respects sea worthy. A proper and competent watch was maintained and, prior to the collision hereinafter described, she was displaying regulation anchor lights which were burning brightly. Fog signals prescribed by law for a vessel at anchor were being sounded. While the EGLANTINE was lying so moored, fog signals from a vessel under way which proved to be the BRAZOS were heard approaching on the port side. Shortly thereafter the BRAZOS came out of the fog at a high and dangerous rate of speed and without apparent change of course crashed into the port side of the EGLANTINE, tearing a hole in her side abreast of #2 hatch and causing serious damage to her hull and cargo.

Twelfth: The collision and consequent damage were not due to any fault on the part of this claimant or any person for whom it is responsible but were due solely to the fault and neglect of the steamship BRAZOS and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.
2. She failed to keep a proper lookout.
- [fol. 44] 3. She was proceeding at an excessive rate of speed.
4. She failed to keep in the prescribed channel.
5. She failed to stop her engines when the fog signal of the EGLANTINE was or should have been heard forward of her beam.
6. She failed to stop and reverse her engines in time to avoid collision when danger thereof was or should have been apparent.
7. She collided with the EGLANTINE which was a properly moored vessel.
8. She failed to proceed with the caution required by weather conditions.
9. She took no proper steps to avoid collision.

Thirteenth: All and singularly the premises are true.

Wherefore claimant prays that the petition herein be dismissed as to it with costs against the petitioner and that a decree may be entered in favor of this claimant against the petitioner in the amount of its damages with interest and costs, and that this claimant may have such other and further relief as may be just.

George Z. Medalie, United States Attorney, Proctor
for Claimant, Office & P. O. Address, 45 Broad-
way, Borough of Manhattan, City of New York.

(Duly Verified.)

[fol. 45] EXHIBIT "D" TO STIPULATION OF FACTS

Interlocutory Decree

At a Stated Term of the United States District Court for the Southern District of New York, held in the Court Rooms thereof in the United States Court House, Foley Square

in the Borough of Manhattan, City of New York on the 27th day of July, 1937.

Present: Honorable Henry W. Goddard, District Judge.

A 110-104

In the Matter of The Petition of CLYDE-MALLORY LINES, as Owner of S. S. BRAZOS, for Exoneration from or Limitation of Liability

Whereas a verified petition was filed herein on December 28, 1932, by Clyde-Mallory Lines, as owner of S. S. BRAZOS, claiming the benefit of the limitation of liability provided for in Sections 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the statutes supplementary thereto and amendatory thereof and praying for exoneration from or limitation of its liability and the liability of any other person or party interested in said steamship, and also contesting its liability independently of the limitation of liability claimed in said petition for any loss, damage, injury or destruction caused by, or resulting from, the collision between S. S. BRAZOS and S. S. EGLANTINE which occurred on December 21, 1932, off Galveston, Texas; and

[fol. 46] Whereas this Court, by an order duly entered herein on December 28, 1932, directed that petitioner file an ad interim stipulation for values for its interest in said S. S. BRAZOS in the sum of \$31,500 with interest from December 28, 1932, with surety according to the rules and practice of this Court; and

Whereas an ad interim stipulation, executed by said petitioner and by the International Fidelity Insurance Company as surety, providing for the payment of said sum of \$31,500 with interest from December 28, 1932, was duly filed herein on December 29, 1932; and

Whereas this Court, by an order duly entered herein on December 28, 1932, directed that a monition issue out of and under the seal of this Court against all persons claiming damages for any and all losses, damages, injuries or destruction occasioned by, resulting from, or consequent upon the collision between S. S. BRAZOS and S. S. EGLANTINE which occurred on December 21, 1932, and against all persons having any claims against petitioner, S. S. BRAZOS, her engines, boilers and equipment on pending freight and passage monies, if any, citing them to

appear before this Court on February 17, 1933, and make due proof of their respective claims before Anthony Menkel, Esq., Commissioner appointed by this Court to receive such claims, and such a monition having been duly issued herein on December 29, 1932, by the Clerk of this Court, and

Whereas notice of the filing of said petition and the issuance of said monition was duly given by publication as required by law and by the rules and practice of this Court, and upon the return of said monition proclamation having been duly made in open Court; and

Whereas, by several orders duly entered herein, this Court extended the time of any and all persons to file claims [fol. 47] with the Commissioner appointed by the Court to receive claims to October 6, 1933; and

Whereas Anthony Menkel, Esq., the Commissioner appointed to receive claims herein, filed his report with the Clerk of this Court on or about February 20, 1933, and filed supplemental reports on or about May 10, June 26, August 4, and October 11, 1933, from which it appears that certain claims therein enumerated had been presented to him pursuant to the monition issued herein and to the various orders of this Court extending the time within which to file claims; and

Whereas the claims and/or amended claims filed herein by G. E. MADER, master of S. S. EGLANTINE, as bailee, and by Farmer's National Grain Corporation, John Greenwood & Sons, Ltd. and Patrick & Company, Ltd., as shippers and/or consignees of certain cargo laden on board said S. S. EGLANTINE were settled by the payment by petitioner herein to said claimants of the total sum of \$26,820.87 as set forth in Schedule A annexed to an order entered herein on July 18, 1936, which order directed that said claims be fully satisfied and discharged and the petitioner herein and its successors and assigns fully released and discharged of any liability whatsoever in respect thereof; and

Whereas an answer to the petition was duly filed herein on behalf of the United States of America, and

Whereas the issues raised by the petition and by said answer of the United States of America, duly came on to be heard before Honorable Henry W. Goddard, District Judge, at a Stated Term of this Court on the 16th day of February, 1937, and the cause having been argued and submitted by the advocates for the respective parties hereto

and the Court, after due deliberation, having filed its opinion in writing on May 20, 1937, finding the facts and its conclusions of law and holding both S. S. BRAZOS and [fol. 48] S. S. EGLANTINE at fault for the collision set forth in the petition herein and for the damages and losses arising therefrom; and

Whereas the petitioner's right to limit its liability under Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A., Sec's 182-186), was conceded upon the trial;

Now, on the motion of Burlingham, Veeder, Clark & Hupper proctors for petitioner, it is

Ordered; Adjudged and Decreed that the petitioner Clyde-Mallory Lines, as owner of S. S. BRAZOS is not entitled to exoneration from all liability as claimed by it in its petition herein, but that the prayer of said petitioner for limitation of its liability herein be, and the same hereby is, granted, and said petitioner is allowed the benefit of such limitation or liability as is provided for in Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A. Secs. 182-186) for any loss, damage, or injury arising out of the matters alleged in the petition herein and that the liability of petitioner for any such loss, damage, or injury arising as aforesaid is hereby limited to the value of petitioner's interest in said S. S. BRAZOS and her pending freight on December 28, 1932; and it is further

Ordered, Adjudged and Decreed that S. S. BRAZOS and S. S. EGLANTINE were mutually at fault for the collision which occurred on December 21, 1932, off Galveston, Texas, and that the claimant, The United States of America, provided its damages exceeds petitioner's damages, recover of and from said S. S. BRAZOS and/or petitioner herein and/or its stipulators for costs and for value in accordance with the terms of their respective stipulations; subject to the limitation of liability allowed herein to petitioner as owner of S. S. BRAZOS, one-half the difference between [fol. 49] the amount of the damages sustained by said claimant as owner of S. S. EGLANTINE and the amount of the damages sustained by petitioner as owner of S. S. BRAZOS, together with interest thereon and together with one-half the difference between the costs incurred by said claimant in establishing the partial fault of S. S. BRAZOS

for said collision and the costs of petitioner to be taxed according to law; and it is further

Ordered, Adjudged and Decreed that the default of all persons or corporations who or which may have sustained or who or which may claim for any loss, damage, injury or destruction resulting or arising from or growing out of the collision referred to in the petition herein and who or which have not heretofore presented or filed claims in this proceeding, be, and the same hereby is, noted and entered; and that all claims which have not heretofore been filed in this proceeding be, and the same hereby are, forever barred and that the petitioner herein and S. S. BRAZOS, be, and they hereby are, discharged from all liability in respect thereof; and it is further

Ordered that all persons or corporations having any claim whatsoever against petitioner herein or against S. S. BRAZOS, except those who have already filed claims, be, and they are perpetually enjoined and stayed from instituting any suit, action or proceeding of any kind whatsoever by reason of the matter set forth in the petition herein; and it is further

Ordered that this matter be referred to Edward H. Childs, Esq., as Special Commissioner to take such further proofs as may be offered as to the amount, validity and priority of all claims filed herein to which objections have been filed, to marshal said claims in accordance with law, and to report thereon to this Court with all convenient speed together with the evidence taken before him in respect to said claims, and with his opinion in addition as respects the various claims filed herein.

[fol. 50]

Henry W. Goddard, U. S. D. J.

Notice of settlement of the foregoing Interlocutory Decree is hereby waived.

New York, N. Y., July 22, 1937.

Lamar Hardy, U. S. Attorney for the Southern District of N. Y., by C. E. Wythe, Special Assistant United States Attorney.

EXHIBIT "E" TO STIPULATION OF FACTS

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the Court Rooms thereof in the United States Court House,

Foley Square, Borough of Manhattan, City of New York,
on the 5th day of August, 1940.

Present: Honorable Murray Hulbert, District Judge.

Ad. 110-104

In the Matter of The Petition of CLYDE-MALLORY LINES, as
Owner of S. S. BRAZOS, for Exoneration from or Limita-
tion of Liability

An interlocutory decree on mandate having been duly entered herein on April 1, 1938, whereby it was ordered, adjudged and decreed (1) that the judgment of the United [fol. 51] States Circuit Court of Appeals for the Second Circuit as set forth in its mandate filed herein in the office of the Clerk of this Court on March 10, 1938, be made the judgment of this Court and that the interlocutory decree entered herein on July 27, 1937, be affirmed; (2) that petitioner was not entitled to exoneration from all liability as claimed by it in its petition herein, but was allowed the benefit of such limitation of its liability as provided for in the Revised Statutes of the United States and limiting petitioner's liability to the value of its interest in S. S. BRAZOS and her pending freight as of December 28, 1932; (3) that S. S. BRAZOS and S. S. EGLANTINE were mutually at fault for the collision which occurred on December 21, 1932, off Galveston, Texas, and that the United States of America, provided its damages exceeded the damages sustained by petitioner, recover of and from S. S. BRAZOS and/or petitioner herein and/or its stipulators for costs and for value, subject to the limitation of liability allowed to petitioner, one-half the difference between the amount of the damages sustained by said claimant as owner of S. S. EGLANTINE and the amount of the damages sustained by petitioner as owner of S. S. BRAZOS, together with interest thereon, and one-half the difference between the costs incurred by said claimant in establishing the partial fault of S. S. BRAZOS for said collision and the costs of petitioner to be taxed; (4) that the default of all persons or corporations who or which had not presented or filed claims in this proceeding be noted and entered and that all claims not filed in this proceeding for any loss, damage, injury or destruction resulting or arising from or growing out of said collision be forever barred, and that petitioner and said S. S. BRAZOS be discharged from all liability in

respect of such claims; (5) that all persons and corporations having any claims whatsoever against petitioner herein or against S. S. BRAZOS, except claimant the United States of America, are perpetually enjoined and stayed from instituting any suit, action or proceeding by reason of the matters set forth in the petition herein; and [fol. 52] (6) whereby this matter was referred to Edward H. Childs, Esq., as Special Commissioner to take such proofs as may be offered as to the amount, validity and priority of the claims filed herein and to report thereon to this Court with all convenient speed; and the damages of the petitioner herein having been stipulated at the sum of \$34,280.93, and the damages of the claimant the United States of America having been stipulated at the sum of \$26,621.70, as appears by the stipulation dated July 1, 1940, signed by the proctors for the respective parties herein and annexed hereto and made a part hereof;

Now, on motion of Burlingham, Veeder, Clark & Hupper, proctors for petitioner, it is

Ordered, Adjudged and Decreed that the collision described in the petition herein between steamship BRAZOS and steamship EGLANTINE which occurred off Galveston, Texas, on December 21, 1932, was caused by the mutual fault of said vessels and did not occur with the privity or knowledge of said petitioner; and it is further

Ordered, Adjudged and Decreed that petitioner, as owner of steamship BRAZOS, is entitled to limitation of its liability as provided for in Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A. Secs. 182-186) for any loss, damage or injury arising out of the matters alleged in the petition herein and that the liability of petitioner for any such loss, damage or injury arising as aforesaid is hereby limited to the value of petitioner's interest in said steamship BRAZOS and her pending freight as of December 28, 1932, with interest thereon from said date; and it is further

Ordered, Adjudged and Decreed that the claim presented herein by the United States of America for damages to [fol. 53] steamship EGLANTINE having been stipulated at the sum of \$26,621.70, which sum is less than the amount of damages sustained by petitioner, as owner of steamship BRAZOS, stipulated at the sum of \$34,280.93, as set forth in the stipulation hereto annexed and hereby made a part of this decree, is not recoverable herein, and that said claim

be, and it hereby is, dismissed without cost to petitioner against said claimant; and it is further

Ordered, Adjudged and Decreed that the default of all persons or corporations who or which may have sustained or are or which may claim for any loss, damage, injury or destruction resulting or arising from or growing out of the collision referred to in the petition herein and who or which have not heretofore presented or filed claims in this proceeding be, and the same hereby is, noted and entered; and that all claims which have not heretofore been filed in this proceeding be, and the same are forever barred and that the petitioner herein and steamship BRAZOS be, and they hereby are, discharged from all liability in respect thereof; and it is further

Ordered; Adjudged and Decreed that all persons or corporations claiming or who or which may hereafter claim for any loss, damage or injury occasioned by or resulting from the collision referred to in the petition herein be, and the same hereby are, perpetually restrained and enjoined from bringing, commencing or instituting any action or actions or any suits or any proceeding whatsoever against petitioner herein or against the steamship BRAZOS for any loss, damage or injury occasioned by or resulting from said collision; and it is further

Ordered that all bonds and stipulations furnished herein by any of the parties hereto shall be and they hereby are cancelled of record and the sureties thereon discharged from all liability thereunder; and it is further

[fol. 54] Ordered that this decree may be served within the Southern or Eastern Districts of New York in the usual manner and within any other district or districts of the United States by the United States Marshal for such district or districts by delivering a copy of this decree and by exhibiting a certified copy thereof to the party or person to be served.

(Sgd.) Hulbert, U. S. D. J.

A True Copy.

(Sgd.) George J. H. Follmer, Clerk. (Seal)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

A-110-104

In the Matter of the Petition of CLYDE-MALLORY LINES, as
Owner of S. S. Brazos for Exoneration from or Limita-
tion of Liability

It is Hereby Stipulated by and between the petitioner,
Clyde-Mallory Lines, and the claimant, United States of
America, that the damages sustained by the petitioner and
the claimant aforesaid by reason of the collision set forth in
the petition herein are as enumerated below:

[fol. 55]

Damages of Petitioner

Clyde-Mallory Line

1. Survey at Key West	\$76.08
2. Survey at New York	70.60
3. Further survey at New York	60.00
4. Telephone calls	37.60
5. Telegrams	17.34
6. Repairs	2,840.00
7. Settlement of cargo claims	26,820.87
8. Additional cargo claim	104.72
9. Loss of profits during lay-up for repairs	2,718.72
10. Wages during lay-up for repairs	1,235.00
11. Fuel, water and stores consumed during lay- up for repairs	300.00

Total \$34,280.93

Damages of Claimant

United States of America

1. Repairs	\$14,980.00
2. Additional repairs	782.00
3. Adjusting compass	75.00
4. Repairs to boat davit	345.00
5. Six 1/2 inch turnbuckles	7.94
6. Towage	125.00
7. Towage	40.00

8. Pilotage	20.00
9. Running lines	10.00
10. Running lines	7.00
11. American Bureau, survey	115.00
12. Salvage Association, surveys	269.79
13. Pilotage	20.00
14. Salvage	1,000.00
15. Towage	300.00 °
16. Fresh water	75.25
[fol. 56]	
17. Fresh water	8.50
18. " "	7.77
19. Manila rope	20.40
20. Tarpaulin	38.48
21. Wire rope	39.65
22. Electric lamps	5.11
23. Discharging and reloading at Galveston	7,496.99
24. Lighting pier during discharge	12.25
25. Barges standing by	230.00
26. Extra wharf hire	189.75
27. Reconditioning cotton bales	3.90
28. Reconditioning cotton bales	7.00
29. Lighting pier	6.85
30. Wharfage on cotton	139.32
31. Wharfage on cotton	465.50
32. Hire of space on pier 36 to dry cotton	7.30
33. Inward wharfage on corn discharged	224.00
34. Inward wharfage on staves, etc.	54.39
35. Shed hire	50.00
36. Extra shed hire	24.32
37. Master's extra expenses	14.00
38. Dunnage to replace dunnage destroyed	60.97
39. Fuel oil consumed during detention	397.69
40. Insurance on cargo transhipped on s. s. West Chatala	109.53
41. Insurance on liens and legal liability	35.00
42. Fire insurance on cargo discharged	12.43
43. Insurance on general average liens and dis- bursements	28.75
44. Insurance on general average liens and dis- bursements	18.75
45. Traveling expense, Lykes Bros.	25.80
46. Noting protest	2.50
47. Survey report on damaged cargo at Liverpool	161.95

48. Telephone calls	1.93
49. Fee for collecting general average deposits	352.54
50. Cargo survey at Galveston	625.00
51. Commissions on general average disbursements	252.69
[fol. 57]	
52. Wages and provisions during detention	2,213.92
53. Stores consumed during detention	11.30
54. Directing and supervising discharge and Re-loading at Galveston	250.00
55. Drawing general average agreements and obtaining signatures thereto	200.00
56. Valuation of vessel for general average	50.00
57. Mimeographing general average statement	240.00
58. Services of average adjuster	1,826.89
59. Collecting and settling general average	454.85
60. Vessel's general average proportion of allowance to cargo	2.48
61. Loss of freight on cargo of corn damaged in discharging	1,323.47
62. Radios, cables, telegrams	72.65
63. Cost of discharging damaged soya beans at Liverpool	48.27
64. Demurrage	3,000.00
<hr/>	
Total	\$38,996.82
65. Less Cargo's general average contribution	12,375.12
<hr/>	
	\$26,621.70

It is Further Stipulated and Agreed that the Computation of Interest on the above items of the damages shall await the disposition of the United States District Court for the District of Louisiana in a suit brought therein by the petitioner herein in which the claimant herein has appeared as claimant of the steamship EGLANTINE, arising out of the same collision.

Dated: New York; N. Y., July 1st, 1940.

(Signed) Burlingham, Veeder, Clark & Hupper,
[fol. 58] Proctors for Petitioners. (Sgd.) John T. Cahill, U. S. Attorney, by C. J. Carroll, Special Asst., Proctors for Claimant.

EXHIBIT F TO STIPULATION OF FACTS

Dates of Payment

Brazos' Damages

1. Survey at Key West, December 24, 1933	\$76.08
2. Survey at New York, February 16, 1933	70.60
3. Further survey at New York, February 16, 1933	60.00
4. Telephone calls, January 9, 1933	37.60
5. Telegrams, January 9, 1933	17.34
6. Repairs, March 30, 1933	2,840.00
7. Settlement of cargo claims, July 15, 1936	26,820.87
8. Additional cargo claim, Agreed to be paid but not yet paid	104.72
9. Loss of profits during lay-up for repairs January 10, 1933	2,718.72
10. Wages during lay-up for repairs January 10, 1933	1,235.00
11. Fuel, water and stores consumed during lay-up for repairs, January 10, 1933	300.00

Total

\$34,280.92

[fol. 59]

Eglantine's Damages

1. Repairs. January 13, 1933	\$14,980.00
2. Additional repairs. February 3, 1933	782.00
3. Adjusting compass. January 25, 1933	75.00
4. Repairs to boat davit. January 12, 1933	345.00
5. Six 1/2 inch turnbuckles. February 3, 1933	7.94
6. Towage. January 20, 1933	125.00
7. Towage. January 24, 1933	40.00
8. Pilotage. February 3, 1933	20.00
9. Running lines. February 3, 1933	10.00
10. Running lines. February 3, 1933	7.00
11. American Bureau, survey. January 24, 1933	115.00
12. Salvage Association, surveys. \$60 on March 25, 1933 and \$209.79 on May 18, 1933	269.79
13. Pilotage. January 10, 1933	20.00
14. Salvage. September 14, 1933	1,000.00
15. Towage. January 11, 1933	300.00
16. Fresh Water. January 20, 1933	75.25
17. Fresh Water. January 26, 1933	8.50

18. Fresh Water. January 15, 1933	7.77
[fol. 60] 19. Manila rope. January 30, 1933	20.40
20. Tarpaulin. February 3, 1933	38.48
21. Wire rope. January 13, 1933	39.65
22. Electric lamps. February 3, 1933	5.11
23. Discharging and reloading at Galveston. February 3, 1933	7,496.99
24. Lighting pier during discharge. January 12, 1933	12.25
25. Barges standing by. February 2, 1933	230.00
26. Extra wharf hire. January 10, 1933	189.75
27. Reconditioning cotton bales. January 18, 1933	3.90
28. Reconditioning cotton bales. January 19, 1933	7.00
29. Lighting pier. February 3, 1933	6.85
30. Wharfage on cotton. February 3, 1933	139.32
31. Wharfage on cotton. February 3, 1933	465.50
32. Hire of space on pier 36 to dry cotton. Feb- ruary 3, 1933	7.30
33. Inward wharfage on corn discharged. Feb- ruary 3, 1933	224.00
34. Inward wharfage on staves, etc. February 3, 1933	54.39
35. Shed hire. February 3, 1933	50.00
36. Extra shed hire. February 3, 1933	24.32
37. Master's extra expenses. March 20, 1933 [fol. 61]	14.00
38. Dunnage to replace dunnage destroyed. February 10, 1933	60.97
39. Fuel oil consumed during detention. Jan- uary 9, 1933	397.69
40. Insurance on cargo transhipped on S. S. WEST CHATALA. January 30, 1933	109.53
41. Insurance on liens and legal liability. March 1, 1933	35.00
42. Fire insurance on cargo discharged. March 20, 1933	12.43
43. Insurance on general average liens and dis- bursements. March 20, 1933	28.75
44. Insurance on general average liens and dis- bursements. March 20, 1933	18.75
45. Traveling expenses, Lykes Bros. January 4, 1933	25.80

46. Noting protest. January 11, 1933	2.50
47. Survey report on damaged cargo at Liverpool. April 1, 1933	161.95
48. Telephone calls. May 9, 1933	1.93
49. Fees for collecting general average deposits. May 15, 1933	352.54
50. Cargo survey at Galveston. March 1, 1933	625.00
51. Commissions on general average disbursements. December 1, 1933	252.69
52. Wages and provisions during detention. January 9, 1933	2,213.92
53. Stores consumed during detention. January 9, 1933	11.30
[fol. 62]	
54. Directing and supervising discharge and re-loading at Galveston. November 17, 1933	250.00
55. Drawing general average agreements and obtaining signatures thereto. December 1, 1933	200.00
56. Valuation of vessel for general average. November 20, 1933	50.00
57. Mimeographing general average statement. December 1, 1933	240.00
58. Services of average adjuster. December 1, 1933	1,826.89
59. Collecting and settling general average. December 1, 1933	454.85
60. Vessel's general average proportion of allowance to cargo. December 1, 1933	2.48
61. Loss of freight on cargo of corn damaged in discharging. July 6, 1933	1,323.47
62. Radios, cables, telegrams. March 1, 1933	72.65
63. Cost of discharging damaged soya beans at Liverpool. March 23, 1933	48.27
64. Demurrage. January 9, 1933	3,000.00
Total	\$38,996.82
65. Less cargo's general average contribution. July 15, 1936	12,375.12
TOTAL	\$26,621.70

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTE OF EVIDENCE—Filed February 13, 1941

Be It Remembered that when on the 10th day of February, 1941, the above numbered and entitled cause was called for trial before this Honorable Court, the Proctors for Clyde-Mallory Steamship Lines, Libellant herein, produced, offered and filed in evidence, in open Court, the following documents on behalf of Libellant:

1. The Stipulation of Facts entered into between the parties hereto under date of New Orleans, Louisiana, January 8th., 1941, together with all of the Exhibits therein mentioned and attached thereto, to wit:

Exhibit A—Copy of Petition of Libellant for limitation of liability, filed in the United States District Court for the Southern District of New York on or about December 23rd, 1932;

Exhibit B—Copy of Claim of United States of America filed in said Limitation Proceedings;

Exhibit C—Copy of Answer of United States of America filed in said Limitation Proceedings;

[fol. 64] Exhibit D—Copy of Interlocutory Decree of said Court entered in said Limitation Proceedings on July 27th., 1937;

Exhibit E—A certified copy of the Final Decree, on Mandate, of said Court entered in said Limitation Proceedings on August 5th., 1940, and the Stipulation of the parties as to the amount of damages sustained by each, attached to said Final Decree, on Mandate; and

Exhibit F—A statement showing the dates upon which the several items of damages sustained were suffered and paid.

Denegre, Leovy & Chaffe, Proctors for Libellant.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

New Orleans, Thursday, February 13, 1941.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge. Hon. A. J. Caillouet, Judge.

BORAH, J.:

HEARING ON MERITS & SUBMISSION

This cause came on this day to be heard on the merits.

Present: Henry Bruns, Esq., Proctor for Libellant; L. V. Cooley, Jr., Esq., Asst. U. S. Attorney, for United States of America intervening claimant.

[fol. 65] Whereupon, after hearing arguments of counsel for the respective parties, the matter was submitted upon briefs received this day.

IN UNITED STATES DISTRICT COURT

No. 289. Admiralty

CLYDE-MALLORY LINES

versus

STEAMSHIP "EGLANTINE"

OPINION—Filed April 26, 1941

Burlingham, Veeder, Clark and Hupper, Denegre, Leovy & Chaffe, Proctors for Libellant.

L. V. Cooley, Jr., Assistant United States Attorney, Proctor for Claimant, United States of America.

BORAH, District Judge:

This is a suit by Clyde-Mallory Lines, owner of the Steamship Brazos, against the steamship Eglantine, in rem, on a cause of action arising out of the collision which occurred between said vessels off the entrance to Gal-

veston harbor on December 21, 1932. The material facts are these:

FINDINGS OF FACT

The libellant, a Maine corporation is and at all times herein mentioned has been the owner of the Brazos. At the time of the collision the Eglantine was owned by the [fol. 66] United States of America and was being operated as a merchant vessel of the United States.

Subsequent to the collision but prior to the filing of this libel, the Eglantine was sold by the United States and at the time of the beginning of this suit was owned by Lykes Brothers-Ripley Steamship Company, Inc., a Louisiana corporation.

On December 23, 1932, Clyde-Mallory Lines filed in the United States District Court for the Southern District of New York its petition for limitation of liability in respect to the damages growing out of the aforesaid collision, and the United States appeared in said proceedings as owner of the Eglantine and filed its claim and its answer to the petition.

In due course the limitation proceedings came on for trial and the District Court, in determining the question of liability, held that the Eglantine and the Brazos were mutually at fault for the collision. An interlocutory decree was thereafter duly entered; whereupon the United States appealed. On February 21st, 1938 the decree of the District Court was affirmed. 99 F. (2d) 95. However, the final decree was not entered in the District Court until August 5th, 1940, and as will appear from a stipulation of the parties attached to the final decree on mandate, it was then agreed that the damages sustained by Clyde-Mallory Lines, amounted to the sum of \$34,280.93 and that the damages sustained by the United States amounted to the sum of \$26,621.70, both sums being exclusive of interest.

The present libel is the first pleading of any kind filed by Clyde-Mallory Lines, or on behalf of the Brazos, seeking to recover affirmatively from the Eglantine or the United States the damages sustained by Clyde-Mallory Lines or the Brazos by reason of the aforesaid collision. Upon the filing of this libel on June 10th, 1937, process [fol. 67] in rem was issued against the Eglantine and she was seized and taken into custody by the United States

Marshal of this District. Thereupon and pursuant to the provisions of Section 4 of the Suits in Admiralty Act, U. S. Code, Title 46, Section 744, the United States intervened, alleging among other things that it was a party at interest in the action; that the action was a claim against the United States; and that the United States desired the release of the Eglantine and assumed the liability for the satisfaction of any decree which might be obtained in said cause. Whereupon the Eglantine was released from seizure without the furnishing of bond.

Thereafter the United States filed its exception to the libel on the sole ground that "the libel, on its face, indicates that it was not filed in compliance with the provisions of Section 5 of the Suits in Admiralty Act (March 9, 1920, c. 95, sec. 5, 41 Stat. 526; 46 U. S. Code, Section 745, as amended)." The exception came on for hearing and was overruled on the authority of *The Bascobal*, 295 Fed. 299, a decision from this the Fifth Circuit, and the *Caddo*, 285 Fed. 643. The *Bascobal* decision is squarely in point. The exception filed herein raised precisely the same contention and point as was urged in *The Bascobal* case and the Court there expressly determined that a suit such as the present one is not barred by the limitations prescribed by Section 5 of the Suits in Admiralty Act. It seems plain that the present suit is not one authorized by the Suits in Admiralty Act. It is not a suit against the United States; it is a suit in rem against a vessel privately owned. The United States has voluntarily intervened. Under these circumstances the limitations of Section 5 of the Suits in Admiralty — limiting the time within which suits against the United States may be brought are not applicable to the instant suit, and the authorities, *supra*, so hold.

[fol. 68] This suit is now before the Court on final hearing and by agreement has been submitted for final decision and decree solely upon the pleadings and a stipulation of facts. The written stipulation on file recites that the agreement is without prejudice to the exception to the libel filed by the United States and without prejudice to the exceptions and the motion to strike filed by the Clyde-Mallory Lines in connection with the answer of the United States. The last mentioned exceptions and motion to strike have never been submitted to or heard by the Court and they are being submitted at this time for such

action as the Court may find necessary or proper. Under the circumstances, and for convenience of discussion, the questions thus presented will be referred to the merits.

DISCUSSION

There is no issue here as to the right of recovery of the respective vessel owners or as to the amount of damages suffered by each as a result of the collision as these questions were settled in the New York litigation. Under the admiralty practice libellant could not set up against the United States in the limitation proceedings an affirmative claim for its collision damages, even though it had to defend in such proceedings the claim of the United States for its collision damages. Consequently, the Court in its final decree could only dismiss the claim of the United States on the ground that it could not recover any damages in the limitation proceedings because its damages were less than the amount of damages suffered by libellant. And it is because the Court could not in the limitation proceedings award libellant affirmative recovery of one-half of the difference between its damages and those of the United States that libellant is here seeking in this suit to recover such one-half of the difference, or \$3,829.61 and interest.

[fol. 69] There are but three questions that arise for decision: (1) The question of prescription or limitation which has already been decided against claimant and which requires no further consideration; (2) The question of laches pleaded by the claimant in its answer; and (3) The fixing of the interest to be awarded.

The plea of laches is predicated on the fact that this libel was filed on June 10, 1937, approximately four and one-half years after the date of the collision. The present suit was filed while the limitation proceedings were still in litigation and before a final decision was rendered on the question of liability, and before the United States District Court, acting under mandate of said decree of the United States Circuit Court of Appeals, finally determined the amount of damages suffered by the respective parties as a result of the collision. There is no merit in the plea. Claimant has had its day in Court both on the merits and in seeking to recover on its claim for damages, and it is now in-

equitably attempting to bar libellant's attempt to recover its damages to which the courts have found in effect that libellant is entitled. It is too plain for argument that libellant has not been guilty of laches in seeking a determination of liability for the collision in suit.

In the stipulation of damages annexed to the final decree in the New York Proceedings it was agreed:

"It Is Further Stipulated And Agreed That The computation of interest on the above items of the damages shall await the disposition of the United States District Court for the Eastern District of Louisiana in a suit brought therein by the petitioner herein in which the claimant herein has appeared as claimant of the steamship Eglantine, arising out of the same transaction."

[fol. 70] While the amount of damages, to be recovered by libellant in this suit is necessarily fixed by the New York decree and the stipulation of record at one-half the difference between the libellant's damages of \$34,280.93 and the claimant's damages of \$26,621.70, or \$3,829.61 (one-half of \$7,659.23), it is agreed that the amount of interest at the rate of four per centum per annum shall run as ordered by this Court.

The general rule is to allow interest from the date of the collision. *Managua Nav. Co. et al. v. Aktieselskabet Borgstad*, 7 F. (2d) 990. I find nothing in this case to justify an exception to the general rule.

CONCLUSIONS OF LAW

The fact that the Eglantine was owned and operated by the United States when the cause of action alleged in the libel arose, did not prevent the accrual of that cause of action nor exempt the vessel from libel and seizure after it passed into private ownership and operation.

The fact that the Eglantine was subject to arrest and seizure when this suit was brought by the filing of the libel herein in rem, keeps this suit from being one authorized by the Suits in Admiralty Act, and from being one within the influence of Section 5, and it follows that the limitations in Section 5 are not applicable.

The plea of laches is without merit.

Libellant should have judgment herein against the United States of America for \$3,829.61, together with interest at the rate of 4 per centum from December 21, 1932, and costs.

Let a decree be entered accordingly.

New Orleans, Louisiana.

April 25, 1941.

(Signed) Wayne G. Borah, United States District Judge.

[fol. 71] IN UNITED STATES DISTRICT COURT

No. 289 In Admiralty

CLYDE MALLORY LINES

v.

STEAMSHIP "EGLANTINE"

DECREE—Filed April 29, 1941

This cause came on at a former date to be heard upon the pleadings and proofs adduced on behalf of the respective parties and was argued by Proctors for the parties at interest and submitted, when the Court took time to consider:

Whereupon, and on due consideration thereof, and for written reasons and Findings of Fact and Conclusions of Law of the Court in writing and on file herein;

It Is Ordered, Adjudged And Decreed that there be judgment herein in favor of Libellant, Clyde Mallory Lines, as prayed for, and that said Libellant, Clyde Mallory Lines, do have and recover of and from the Claimant and Respondent, United States of America, the full sum of Three Thousand Eight Hundred and Twenty-nine and 61/100 Dollars (\$3,829.61), with interest thereon at the rate of Four per centum (4%) per annum from December 21, 1932, until paid, together with all costs of Court.

New Orleans, Louisiana, April 29, 1941.

(Signed) Wayne G. Borah, United States District Judge.

Approved as to form: (Sgd.) Denegre, Leovy & Chaffe, Proctors for Libellant. (Sgd.) L. V. Cooley, Jr., Asst. [fol. 72] U. S. Attorney, Proctor for Claimant & Respondent.

IN UNITED STATES DISTRICT COURT

{Title omitted}

PETITION FOR APPEAL—Filed July 25, 1941

To The Honorable the Judges of the United States District Court in and for the Eastern District of Louisiana

Comes now the United States of America, respondent in the above entitled cause, feeling aggrieved by the judgment rendered and entered herein on the 29th day of April, 1941, desiring an appeal from the said judgment of the said date to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the Assignments of Error filed in this cause simultaneously with the filing of this petition for appeal, and therefore prays that it be allowed to appeal as aforesaid and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of that Court in such case made and provided.

(Sgd.) Rene A. Viosea, United States Attorney.

(Sgd.) L. V. Cooley, Jr., Assistant United States Attorney.

[fol 73] Receipt of copy of foregoing petition for appeal is hereby acknowledged this 28th day of July, 1941, all rights reserved.

(Sgd.) Jas. Hy. Bruns, Attorney for Libellant.

IN UNITED STATES DISTRICT COURT

{Title omitted}

ASSIGNMENTS OF ERROR—Filed July 25, 1941

The petitioner, the United States of America, hereby assigns error to the opinion, findings and decree of the District Court in the above entitled cause as follows:

(1) The Court erred in entering a final decree against the United States of America for \$3,829.61 together with

interest at the rate of four per centum from December 21, 1932, and costs.

(2) The Court erred in holding that the fact that the EGLANTINE was subject to arrest and seizure in an action in rem keeps this suit from being one authorized by the Suits in Admiralty Act.

(3) The Court erred in holding that this action is not an action against the United States.

(4) The Court erred in holding that the fact that the EGLANTINE was owned and operated by the United States when the cause of action arose did not prevent the accrual of that cause of action nor its enforcement against [fol. 74] the vessel in an action in rem after she had passed into private ownership and operation.

(5) The Court erred in holding that Section 5 of the Suits in Admiralty Act is not applicable.

(6) The Court erred in holding that the plea of laches is without merit.

(7) The Court erred in awarding interest from December 21, 1932, until paid.

(8) The Court erred in failing to hold that this suit in rem against the EGLANTINE is not authorized inasmuch as the Suits in Admiralty Act affords the exclusive remedy for the cause of action herein alleged.

(9) The Court erred in failing to hold that the limitation period provided in Section 5 of the Suits in Admiralty Act is a prescription of the right as well as of the remedy.

(10) The Court erred in failing to dismiss the libel with costs.

(Sgd.) René A. Viosca, United States Attorney
(Sgd.) L. V. Cooley, Jr., Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 25, 1941

[fol. 75] This cause coming on to be heard on petition of the United States of America for permission to appeal from a decree of this Court entered herein on the 29th day of April, 1941, and the Court being fully advised in the premises, it is hereby

Ordered and Adjudged that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment of this Court heretofore rendered and filed herein on the 29th day of April, 1941, be and the same is hereby allowed; that a transcript of the record, proceedings and documents upon which the judgment of this Court was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, and that a proper citation issue.

Dated this 25th day of July, 1941.

(Signed) A. J. Caillouet, United States District Judge.

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE—Filed August 20, 1941

To: The Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

It is agreed by and between the undersigned Proctors for the parties hereto that the record on appeal shall be made up and include the following, to-wit:

[fol. 76] 1. Original Libel.

2. Admiralty Process and return thereon.

3. Intervention on behalf of the United States of America and return of service thereon.

4. Order of Release dated June 10th, 1937.

5. Exceptions of the United States of America.

6. Minute entry showing hearing on Exceptions and Order dismissing the same.

7. Answer of the United States of America with attached Interrogatories.

8. Exception and Answer of Libellant to the Interrogatories.

9. Exceptions of Libellant to Answer of the United States of America.

10. Stipulation of Facts by the parties, dated January 8th, 1941, together with exhibits annexed thereto, marked Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F.

11. Note of Evidence on behalf of libellant.

12. Minute entry of submission on final hearing dated February 13th, 1941.

13. Opinion of Court with the Findings of Fact and Conclusions of Law.

14. Final Decree.

15. Petition for Appeal.

[fois. 77-78] 16. Assignments of Error.

17. Order of Appeal.

18. Citation of Appeal and return thereon.

19. This Praecept.

Burlingham, Veeder, Clark & Hupper, Denegre,
Leovy & Chaffe, Proctors for Libellant. L. V.
Cooley, Assistant United States Attorney.

New Orleans, Louisiana, August 20th, 1941.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 25th, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship
"Eglantine",

versus

CLYDE-MALLORY LINES

On this day this cause was called, and, after argument by J. Frank Staley, Esq., Attorney, Department of Justice, for appellant, and Jas. Hy. Bruns, Esq., for appellee, was submitted to the Court.

[fol. 80] OPINION OF THE COURT—Filed April 29, 1942.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship
"Eglantine", Appellant,

versus

CLYDE-MALLORY LINES, Appellee

Appeal from the District Court of the United States for
the Eastern District of Louisiana.

(April 29, 1942)

Before Hutcheson, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

The Steamship Brazos, owned by the Clyde-Mallory Lines, and the Steamship Eglantine, owned by the United States and operated as a merchant vessel, collided in a fog off Galveston, Texas, on December 21, 1932. In limitation-of-liability proceedings promptly brought by Clyde-Mallory Lines, it was determined that the collision was caused

[fol. 81] by mutual fault, and the damages were fixed at \$34,280.93 to the Brazos and \$26,621.07 to the Eglantine.

On June 10, 1937, a libel *in rem* was brought by Clyde-Mallory Lines against the Eglantine, which was then privately owned, to recover one-half the difference between the damages sustained by the two vessels. Upon suggestion of interest by the United States in accordance with Section 4 of the Suits-in-Admiralty Act¹ the Eglantine was released, and the cause proceeded against the United States. Exceptions to the libel were filed by the United States on the ground that the action was not instituted within the time prescribed by Section 5 of the Suits-in-Admiralty Act. The exceptions were overruled, issue was joined, the cause proceeded to trial and resulted in a judgment for the libellant. On appeal from that judgment the vital question is: Does the two-year limitation period prescribed by Section 5 of the Suits-in-Admiralty Act apply to suits brought against a private vessel upon a cause of action that accrued when that ship was owned and operated by the United States as a merchant vessel?

The Suits-in-Admiralty Act was passed March 9, 1920. Since that time two cases have been before the courts involving the question here presented: *The Bascobal*, 295 Fed. 299, decided by this court in 1923, and *The Caddo*, 285 Fed. 643, a district-court decision rendered in 1922. In each instance the court held that the one-year limitation imposed by the Act upon suits brought against the Government on causes of action arising prior to its passage was not applicable to a libel *in rem* brought after the ship had passed from the Government into private ownership. In each instance the conclusion was reached by construing the section to embrace only *in personam* actions against the [fol. 82] Government itself. This Act, like any other that waives sovereign immunity from suits, should be strictly construed in favor of, not strictly construed against, the interests of the United States.² Guided by this fundamental principle of construction, and considering the Act as a whole, the maritime history forming its background,

¹ 41 Stat. 526; 46 U. S. C. A., Sec. 744.

² *Schillinger v. U. S.*, 155 U. S. 163; *Price v. U. S.* 174 U. S. 373; *Eastern Transportation Co. v. U. S.*, 272 U. S. 675; *U. S. v. Michel*, 282 U. S. 656.

the obvious legislative purposes intended to be accomplished thereby, and the related decisions that evolved as the Act was subsequently applied, we are forced to the conclusion that the *Bascobal* and *Caddo* decisions should not be followed here.

No one questions the power of the United States to place limitations upon its gratuitous waiver of its sovereign immunity. By Sections 2, 3, and 4 of the Suits-in-Admiralty Act, the United States imposed personal responsibility upon itself for maritime torts committed by it, fixing an equal potential liability upon itself whether its vessels remained in its hands or were sold to private owners. By Section 5 thereof it required all suits authorized by the Act to be brought within two years after the cause of action arose.

The obvious purpose of Section 5 was to place a limitation upon all liability created by the Act against the United States. Since the United States was subject only to personal liability for its torts, and since the extent of that liability was not in any wise affected by the sale of a vessel to a private owner, unless the unmistakable language of the Act forbids any other construction it is most unreasonable to attribute to Congress an intention to limit the time for filing a suit where the vessel remains in the hands of the Government, and to place no limitation at all upon a suit designed to impose an identical liability upon it where the vessel has been sold.

[fol. 83] The act of the *Eglantine* in colliding with the *Brazos* was not a tort unless the laws of the United States had made it so. If the United States had not waived its sovereign immunity from suit, no cause of action would have accrued to the owners of the *Brazos* either while the vessel remained the property of the Government or after it passed into private ownership.³

At the time the accident occurred, the Suits-in-Admiralty Act furnished the exclusive remedy in admiralty against the United States on all causes of action arising out of the operation of its merchant vessels.⁴ The sovereign im-

³ *The Western Maid*, 257 U. S. 419.

⁴ *U. S. Shipping Board, etc. v. Rosenberg Bros.*, 276 U. S. 202; *Johnson v. U. S. Shipping Board*, 280 U. S. 320; *Cory Bros. v. U. S.*, 51 F. (2d) 1010; *Norton v. Southern Ry. Co.* 246 N. Y. S. 676; *Benedict on Admiralty*, 6th Ed., Sec. 209.

munity of the United States having been waived, an action for tort arose; and the Suits-in-Admiralty Act was the only law by which this result was accomplished. Therefore, the cause of action existed by virtue of the Suits-in-Admiralty Act, was authorized only by that Act, and could not have been effectively prosecuted but for the provisions of that Act.

The revelant portion of Section 5 of the Suits-in-Admiralty Act, as amended June 30, 1932, is as follows: "Suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises."⁵ This provision distinguished between suits as to time only. If the cause of action arose prior to March 9, 1920, all suits, with no differentiation as to the nature of the action or as to the defendant thereto, were required to be brought prior to March 10, 1921. All others, by necessary implication meaning all suits brought on causes of action arising after March 9, 1920, must be brought within two years after the cause of action arose.

[fol. 84] It thus appears that the cause of action here sued upon was created by virtue of the Suits-in-Admiralty Act; that all suits upon such causes of action were required by the Act to be brought within two years after the cause of action arose; and that it was the intention of Congress to limit its liability resulting from the waiver of its sovereign immunity without regard to whether it still owned or had sold its vessels. This suit was not brought within two years after the cause of action arose, and the exceptions to the libel should therefore have been sustained.

The judgment appealed from is reversed, and the cause is remanded to the court below for further proceedings not inconsistent with this opinion.

HUTCHESON, Circuit Judge, dissenting:

I think the *Bascobal* Case was well decided. On its authority I dissent.

⁵ 47 Stat. 420; 46 U. S. C., Sec. 745; 46 U. S. C. A., Sec. 745.

[fol. 85]

JUDGMENT

Extract from the Minutes of April 29th, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship
"Eglantine",

versus

CLYDE-MALLORY LINES

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.
"Hutcheson, Circuit Judge, dissents."

[fol. 91] ORDER DENYING REHEARING

Extract from the Minutes of June 2nd, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship
"Eglantine",

versus

CLYDE-MALLORY LINES

It is ordered by the Court that the petition for rehearing
filed in this cause be, and the same is hereby, denied.

[fol. 92] Clerk's Certificate to foregoing transcript omitted
in printing.

(1451)

[fol. 93] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: *File No. 46,759. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 265. Clyde-Mallory Lines, Petitioner, vs. Steamship "Eglantine," and the United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 29, 1942. Term No. 265 O. T., 1942.

(2762)